

**THE INDIANA CIVIL RIGHTS COMMISSION
311 West Washington Street
Indianapolis, Indiana 46204**

**STATE OF INDIANA)
)
COUNTY OF MARION)**

**PATRICIA ANNE WEST,
Complainant,**

**DOCKET NO. EMra80050656
EEOC NO. 053801657**

vs.

**FRANKLIN COMMUNITY SCHOOL
CORPORATION,
Respondent.**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Comes now Robert D. Lange, Hearing Officer for the Indiana Civil Rights Commission ("ICRC") and enters his Recommended Findings of Fact, Conclusions of Law, and Order (hereinafter "the recommended decision"), which recommended decision is in words and figures as follows:

(H.I.)

And comes not any party filing objections to said recommended decision within the ten (10) day period prescribed by IC 4-22-1-12 and 910 IAC 1-12-1(B).

And comes now ICRC, having considered the above and being duly advised in the premises and adopts as its final Findings of Fact, Conclusions of Law, and Order recommended by the Hearing Officer in the recommended decision, a copy of which is attached hereto and incorporated by reference herein.

Dated: May 21, 1982

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RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing was held before the undersigned Hearing Officer for the Indiana Civil Rights Commission ("ICRC") on March 4, 1982 in the above cause. Complainant Patricia Anne West ("West") was present and was represented by counsel, Mr. Kim G. Orfanos. Respondent Franklin Community School Corp. ("the School") was represented by counsel, Mr. Melvin N. Fredbeck of the Franklin, Indiana law firm of LaGrange, Fredbeck & Deppe. Also present on behalf of the school were Dr. Charles Pratt ("Pratt"), Superintendent of Schools and Mr. Noble Turner ("Turner"), Director of Buildings and Grounds.

After the calling of the last witness, both parties, by counsel, waived the right to make oral closing arguments and agreed that written closing arguments would be filed instead. Such arguments have been filed.

Having considered the evidence introduced by the parties, both oral and documentary, the arguments of counsel, and being duly advised in the premises, the Hearing Officer hereby recommends that ICRC enter the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. West is a Negro (or "black"). (Second Pre-Hearing Statement filed March 2, 1982, Paragraph 2a; hereinafter cited at "PHSII, ____").
3. The School is a public school corporation located in Johnson County, Indiana, and is organized and operates pursuant to Indiana law.
4. West was employed by the School as a Matron at the Franklin Community High School ("the High School") in 1964 and has remained so employed at all times since. As such, she was a part of the Custodial Staff, the duties of which were to clean assigned areas and perform related tasks.
5. During the period since West was hired two (2) additions have been built onto the High School and its custodial staff has expanded from three (3) to ten (10). The buildings inside area are approximately 131,900 square feet. There are fifty-one (51) classrooms and various special area including band room, auditorium, gymnasium and dressing rooms, swimming pool, cafeteria and kitchen, library, vocational agriculture laboratories, administrative and miscellaneous offices, faculty work centers, restrooms, stairways and halls. Outdoor demands on Custodians and/or Matrons are created, at levels depending upon the seasons by use of the football field, baseball diamond, tennis court, athletic program areas, parking lots, roadways, lawn areas, and bushes and shrubs. In the fall of academic year 1981-1982, enrollment was 1,050.
6. At the time West was hired, Mr. Arnold Wilkerson ("Wilkerson") served as Head Custodian at the High School. His duties involved supervision of the Custodians and Matrons and some maintenance work.
7. Wilkerson retired in late 1975. He was replaced by Jimmie Hawk *("Hawk") in December of 1975 or January of 1976. Hawk had been employed by the School since February of 1975. Hawk held this position until he was demoted to Custodian on or about April 7, 1980.
8. West was not qualified for the Head Custodian position assumed by Hawk since she could not perform the required maintenance duties.

9. The Head Custodian was, and the Head Matron is, supervised during the school year by the building principal or his delegate. During the remainder of the year, the Head Custodian is supervised by the Director of Buildings and Grounds (Turner).

10. Approximately six (6) months before Hawk's demotion, Turner came to the conclusion that Hawk was not working out as Head Custodian. He then approached Ms. Sue Montgomery ("Montgomery"), a Caucasian (or "white") Matron (see PHSII, 2e) who was first employed by the School in 1976, about accepting a position as Head Matron ("the position") at the High School. Because Montgomery, like West, was not qualified to perform Hawk's maintenance functions, someone was to be assigned those duties. Unlike Hawke, Montgomery would have a regular cleaning assignment. Apparently because the position involved some overtime, Montgomery, who had small children at home, did not immediately indicate she would accept such a position. No further action was taken at this time, as it was thought by Turner and Pratt, the Superintendent of Schools, that there were no strong candidates among those then employed as Custodians or Matrons. (Custodians are males; Matrons are females. There is apparently no distinction other than title. At any rate, there is no issue of sex discrimination as between Custodians and Matrons in this case.)

11. In determining with whom, and when, to "replace" Hawk, the School considered all Custodians and Matrons to be interested and eligible. It posted no notice of the position, required no application, conducted no interviews, and solicited no references.

12. In late March or early April of 1980, Montgomery decided she would accept the position and so advised the School. She became Head Matron upon Hawk's demotion.

13. West filed the instant complaint with ICRC on May 15, 1980. As amended on June 3, 1980, her complaint alleges that she was denied the position because of race.

14. The School contends that the reason Montgomery was selected was that she was the best qualified person for the position. As between West and Montgomery, the School has referred to the following as reasons why it came to this conclusion:

- a. Montgomery's performance as a Matron was better.
- b. Montgomery had a better attitude toward the bonus program.
- c. Montgomery, unlike West, was willing to work the night shift.
- d. Montgomery, unlike West, was willing to work overtime.

15. West contends that the reason offered by the School is a pretext for racial discrimination, that is, that the stated reason was not the real reason but that instead race was the reason. In support of her position, West has offered evidence of the following:

- a. She was dependable employee and her performance as a Matron was excellent.
- b. She had recently begun to participate in the bonus program and thus her former opposition had mitigated.
- c. She would have considered working overtime and the night shift.
- d. She had more seniority than Montgomery.
- e. She had trained Montgomery when Montgomery was first hired.
- f. The procedure for selection was secretive.

16. West has failed to prove that the School's stated reason for choosing Montgomery over her – that being its belief that Montgomery was more qualified – was not its real reason. The reasons for so finding are:

a. The evidence offered by West is that she was a dependable and excellent employee; however, the evidence she has offered does not compare her performance to that of Montgomery.

b. West does not state that she would have accepted the position with its required overtime on the night shift but only that she would have considered it.

c. The School was under no contractual obligation to award the position to the most senior employee. Nor is there any evidence of any established practice by the School to promote on the basis of seniority. Montgomery had been employed by the School long enough to have a working knowledge of the jobs of Custodians and Matrons.

d. As to training West is apparently referring to evidence that when Montgomery was hired, West showed her around the building and where to obtain cleaning supplies and equipment. Though the School concedes that West performed this task for some employees, there is some dispute as to whether she did so with Montgomery. Whether she did or not, there is no evidence that Montgomery is unable to do this. Nor is there any reason to believe that performance of this task is a necessary prerequisite to adequate performance of the job of the Head Matron.

e. The selection process was indeed secretive and was hardly ideal, (a memorandum commenting on the selection procedure is attached hereto), and certainly increased the risk that the school would err in assessing West's attitudes toward the bonus program, night shift work, and overtime. This, however, is not sufficient to show that the School did not choose Montgomery over West because it believed, erroneously or otherwise, that Montgomery's qualifications were better than West. It is typically true that the lack of accuracy of an employee's stated reason for an employment decision is evidence that the stated reason is not in fact the reason. In this case, however, there is a risk of error accepted by the employer for a reason that is readily apparent, that being that the School simply did not want Hawk to know that he was to be demoted as soon as persons willing to accept his duties could be found.

17. Even if it could be found that the School did not choose Montgomery, over West because of the formers better qualifications, perceived or actual, it could not be found, in this case, that the stated reason was a pretext to cover discrimination because of race for reasons set out below:

a. The School was under no contractual obligation to aware the position to the most senior employee. Nor is there any evidence of any established practice by the School to promote on the basis of seniority. Montgomery had been employed by the School long enough to have working knowledge of the jobs of Custodians and Matrons.

b. As to training, West is apparently referring to evidence that when Montgomery was hired, West showed her around the building and where to obtain cleaning supplies and equipment. Though the School concedes that West performed this task for some employees there is some dispute as to whether she did so with Montgomery. Whether she did or not, there is no evidence that Montgomery is unable to do this. Nor is there any reason to believe that performance of this task is a necessary prerequisite to adequate performance of the job of the Head Matron.

c. The selection process was indeed secretive and was hardly ideal, (a memorandum commenting on the selection procedure is attached hereto), and certainly increased the risk that the School would err in assessing West's attitudes toward the bonus program, night shift work, and overtime. This, however, is not sufficient to show that the School did not choose Montgomery over West because it believed, erroneously or otherwise, that Montgomery's qualifications were better than West. It is typically true that the lack of accuracy of an employee's stated reason for an employment decision is evidence that the stated reason is not in fact the reason. In this case, however, there is a risk of error accepted by the employer for a reason that is readily apparent, that being that the School simply did not want Hawk to know that he was to be demoted as soon as persons willing to accept his duties could be found.

17. Even if it could be found that the School did not choose Montgomery over West because of the formers better qualification, perceived or actual, it could not be found, in this case, that the stated reason was a pretext to cover discrimination because of race for reasons set out below:

a. There is no direct evidence that race had anything to do with the School's decision.

b. There are approximately thirty (30) Custodians and Matrons that the School considered as interested and eligible, nearly all of whom were white. In the absence of some evidence that West was more qualified than these other "competitors", it cannot be determined that the reason which would explain any preference for Montgomery was race.

c. Though Pratt had the authority to hire, he clearly acted upon the recommendation of Turner. Even West testified that Turner was not racially biased or prejudiced.

18. Any Conclusion of Law which should have been deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. ICRC has jurisdiction over the subject matter and the parties.
2. West and the School are each a “person” as that term is defined in IC 22-9-1-3(a), Cf. 910 IAC 1-1-1(A).
3. The School is an “employer” as that term is defined in IC 22-9-1-3(h). Cf. 910 IAC 1-1-1(H), IC 22-9-1-3(i), 910 IAC 1-1-1(I).
4. In determining whether an unlawful act of discrimination occurred the relevant statutory provision reads as follows:

As used in this chapter:...(1) the term “discriminatory practice” means the exclusions of a person, from equal opportunities because of race Every discriminatory practice relating to ...employment...shall be considered unlawful unless it is specifically exempted by this chapter. IC 22-9-1-3(1).

5. In interpreting the Indiana Civil Rights Laws prohibition of discriminatory practices, it is appropriate to consult cases decided by the federal courts under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §200e. *Indiana Bell Telephone Company, Inc. v. Boyd* ____ Ind. App.____, 421 N.E.2d 660, 26 FEP Cases 84-0 (1981), *Indiana Civil Rights Commission v. Sutherland Lumber Company* Ind. App. ____, 394 N.E.2d 949, 26 FEP Cases 835 (1979).
6. Those cases establish generally the burden and allocation of proof as follows: (1) the plaintiff (here, complainant) must first prove, by a preponderance of the evidence, a *prima facie* case; (2) if a *prima facie* case is established, then the defendant (here, respondent) must introduce evidence (not prove, *Burdine*, *Infra.*) that its decision was based on some legitimate business reason; and (3)

the complainant must be given the opportunity to show, by a preponderance of the evidence, that this reason was a pretext for unlawful discrimination. *Texas Department of Community Affairs v. Burdine* 450 U.S. ____, 101 S.Ct. 1089, 25 FEP cases 113 (1981), *Board of Trustees of Keene State College v. Sweeney* 439 U.S. 24, 18 FEP Cases 520 (1979), *Furnco Construction Corporation v. Waters* 438 U.S. 567, 17 FEP Cases 1062 (1978), *International Brotherhood of Teamsters v. U.S.* 431 U.S. 324, 14 FEP Cases 1514 (1977), *McDonnell Douglas Corp. v. Green* 411 U.S. 792, 5 FEP Cases 965 (1973).

7. West met her burden of establishing a *prima facie* case by proving that (1) she is black; (2) she was considered by the School as interested in an eligible for the position; (3) she was qualified for the position; and (4) Montgomery was selected for the position instead of her.

8. The School has introduced evidence of a legitimate business reason for its decision.

9. West has failed to prove by a preponderance of the evidence that the reason stated by the School is a pretext for racial discrimination.

10. The School did not commit an unlawful discriminatory practice by not selecting West for the position of Head Matron n that race was not part of its reason for not selecting her.

11. If ICRC finds that a person has not committed an unlawful discriminatory practice, it must dismiss the complaint as against said person . IC 22-9-1-6(k)(3).

12. Any Finding of Fact which should have been deemed a Conclusion of Law is hereby adopted as such.

ORDER

1. West's complaint should be and the same hereby is, dismissed.

Dated: April 2, 1982

MEMORANDUM

I have found that West was not denied equal opportunity because of race. This, of course, is not to say that she was not denied equal opportunity for some other reason, legal or not fair or unfair. Some comments, of a purely advisory nature, do seem to be in order.

The procedure used by the School to select and the Head Matron falls for short of fair and open competition. That it was thus because the School did not wish to be forthright with Hawk regarding his impending demotion may explain the School's desire for secrecy but does not necessarily justify that desire.

Had West been able to establish that she was the most qualified of all the Custodians and Matrons, she would still have had one last hurdle to clear, that being that Turner, who for all practical purposes made the decision in question, was not racially biased or prejudiced. That she may not have cleared this hurdle is not sufficient reason for the School to be satisfied with its procedure. First, though Turner's shoulders might be strong to carry the School in a race discrimination case, it cannot be determined that the same is true with respect to charges of other forms of prohibited discrimination. Moreover, Turner is neither immortal nor enslaved, so the School may not always be so fortunate.

The School also has an interest that its method for selecting promotees not only be fair to its employees, but also be perceived by the employees as fair. It is obvious that an employee who does not believe that she/he will be fairly considered for promotion will be less motivated to perform to his or her utmost.

The School has stated, through its Superintendent; that it does not post vacancies because that and other unspecified administrative tasks which would be associated with it would just add that many more things to an already long list of tasks. Even had I found a violation, I would not have specified in detail the procedures the School must follow in selecting who is to be promoted. I would have recommended that the method used here not be used and probably that whatever system was adopted in its place allow interested employees some opportunity to explain what they believe to be their assets and to respond to any perceived liabilities.

Though it cannot be said for certain, on this record, that the School's reluctance to utilize a posting practice is based solely on the desire to avoid more work, to the extent that it is, that desire hardly commends itself as a means to get the most out of the taxpayers' dollars.

Thus, though I do not believe the School has been proven to have committed a violation of the Indiana Civil Rights Law against West, it could well find it in its own interest to reevaluate its promotion procedure both to avoid civil right liability and to motivate better performance from its employees.

Dated: April 2, 1982